No. 14,638

United States Court of Appeals

For the Ninth Circuit

OLE FAGERHAUGH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction of contempt of Congress (2 U.S.C., Section 192). The cause was tried without a jury before the Honorable Oliver D. Hamlin, Jr., a judge of the court below. Appellant was sentenced to thirty days imprisonment and to pay a fine—$100.

Jurisdiction of this Court to review the judgment of conviction is conferred by 28 U.S.C., Section 1291 and Rule 37 (a) of the Federal Rules of Criminal Procedure.

STATUTE INVOLVED.

The pertinent statute involved, 2 U.S.C., Section 192, provides as follows:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT OF THE CASE.

On December 4, 1953, the defendant and appellant, Ole Fagerhaugh, was called to testify, pursuant to subpena, at a hearing of a subcommittee of the House Committee on un-American Activities at San Francisco, California. The members of the subcommittee present on the day in question were Representatives Harold H. Velde, chairman, Donald L. Jackson, Gordon H. Scherer, and Clyde Doyle. Mr. Robert L. Kunzig acted as counsel for the subcommittee.

After being sworn, the appellant was asked a few preliminary questions (name, address, place of birth, citizenship, occupation), and then was asked "Where are you presently employed?" Appellant at first re-

fused to answer the question on the ground that the committee already knew his place of employment, a fact which counsel for the committee admitted. However, when the chairman of the subcommittee directed him to answer, appellant, after consulting his attorney, invoked the Fifth Amendment privilege against self-incrimination. The committee did not rule on the validity of the assertion of the privilege or thereafter direct the witness to answer the question. A series of questions pertaining to membership and activity in the Communist Party were also propounded, to all of which the witness likewise invoked the Fifth Amendment. (Source: Transcript of Fagerhaugh testimony, set out in full in the Appendix to this brief.)

On May 11, 1954, the House of Representatives voted to certify Mr. Fagerhaugh's refusal to answer to the United States attorney for prosecution, and appellant was thereupon indicted for contempt of Congress (2 U.S.C. Section 192). The indictment charged only the refusal to answer the question "Where are you presently employed?", a question asserted to be "pertinent to the question then under inquiry before the subcommittee" (Trial Tr. p. 3). A motion to dismiss, raising various points including those raised in this appeal, was filed on behalf of appellant (Trial Tr. p. 6-24) and was denied by the trial court (*id.,* 29, 125). Thereafter, on October 14, 1954, a jury having been waived, the matter came on for trial.

At the commencement of the trial the appellant, through his attorney, offered in open court to purge himself of the charged contempt by answering the

question as to his place of employment, either before the court or before the subcommittee, in any appropriate manner (Trial Tr. p. 34). The trial judge took the offer under advisement and later rejected it (*id.*, 35, 127). After a brief trial appellant was found guilty and sentenced to imprisonment for one month and to pay a fine of one hundred dollars (*id.*, p. 31). Appellant's request for bail pending appeal was denied by the trial court for want of a substantial question. This Court reversed the ruling and ordered appellant admitted to bail in the sum of five hundred dollars. This appeal followed.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court below erred in holding that a witness before a subcommittee of the House Committee on un-American Activities who has been charged under oath with being a leading Communist is not entitled to invoke the self-incrimination clause of the Fifth Amendment when asked where he is employed.

2. The Court below erred in adjudging a witness in contempt of a subcommittee of Congress where, after the witness invoked the privilege against self-incrimination, the subcommittee failed to rule upon the assertion of the privilege or direct the witness to answer the question.

3. The Court below erred in holding a witness to be in contempt of a subcommittee of Congress for refusing to answer a question as to his place of em-

ployment, where the evidence discloses that the subcommittee was fully aware of the answer, and asked the question for the purpose of harassing the witness and subjecting him to extralegal punishment by bringing about the loss of his job.

(The following additional specifications of error were raised in the court below and are deemed valid. However, it is believed that the specifications set out above are fully dispositive of this appeal in view of the recent decisions of the Supreme Court in the *Quinn, Emspak* and *Bart* cases, *infra.* Consequently, specifications 4 to 8, inclusive, will not be argued by the appellant unless requested by the Court.)

4. The Court below erred in holding that a witness who is charged with contempt of a congressional subcommittee because of his refusal to answer a question may not purge the contempt at the time of trial by offering to answer the question in open Court or before the subcommittee.

5. The Court below erred in adjudging the appellant guilty of contempt of a congressional subcommittee on the basis of an incomplete, incorrect and unauthenticated transcript of the record of the witness' testimony before the subcommittee.

6. The Court below erred in invading the appellant's right to privacy in regard to his personal affairs.

7. The subcommittee was acting in excess of and beyond its powers, and with respect to a matter not pertinent to any legitimate subject of inquiry.

8. The subcommittee's inquiry abridged the appellant's right to freedom of speech.

ARGUMENT.

I. APPELLANT VALIDLY ASSERTED THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AMENDMENT.

A. PRINCIPLES APPLICABLE.

Because we believe that the recent decisions of the United States Supreme Court in *Quinn v. United States,* 75 S. Ct. 688, *Emspak v. United States,* 75 S. Ct. 687, and *Bart v. United States,* 75 S. Ct. 712 (May 23, 1955), are controlling with respect to virtually every aspect of this appeal, we shall commence this argument by summarizing the holdings of those decisions which bear directly upon our case:

1. The privilege against self-incrimination is a privilege of great value. The privilege arose historically in protest against such tyrannical inquisitions as the Star Chamber. It is not to be applied narrowly or begrudgingly, but is to be accorded a liberal construction in favor of the right it was intended to secure.

2. The privilege is for the benefit of the innocent as well as the guilty.

3. Although the privilege against self-incrimination may be waived, the waiver must be intelligent and unequivocal, and is not lightly to be inferred.

4. The disclosures which are protected by the privilege are not limited to admissions that would

subject a witness to criminal prosecution, but extend to any testimony which might furnish a link in the chain of evidence needed to prosecute for a federal crime.

5. Questions concerning membership in the Communist Party or so-called Communist Front organizations fall within the scope of the privilege.

6. Where the injurious potentiality of a question is not apparent on its face, resort is had to the implications of the question, in the setting in which it is asked.

7. Where a witness raises an objection to a question asked by an investigating committee, whether on grounds of pertinency or self-incrimination, it is the duty of the committee to rule upon the objection and, if the objection is overruled, to direct the witness to answer.

8. The power of Congress to investigate does not extend to inquiry into private affairs unrelated to a valid legislative purpose, or to an area in which Congress is forbidden to legislate.

We believe that the foregoing principles, applied herein, require a reversal of the decision of the Court below.

B. THE SETTING IN WHICH THE PRIVILEGE WAS ASSERTED.

The possibly incriminating quality of an answer to a question seemingly "innocent upon its face," such as the question "Where are you presently employed?", is to be determined in the light of "the

implications of the question, in the setting in which it is asked." *Emspak v. United States,* 75 S. Ct. 687, at 692; *Hoffman v. United States,* 341 U.S. 479, 486-487 (1950). Unless it is "perfectly clear from a careful consideration of all the circumstances in the case" that a responsive answer *"cannot possibly"* have a tendency to incriminate, the assertion of the privilege must be sustained. *Hoffman v. United States, supra,* at 488. In the present case the setting which establishes the incriminating implications of the question as to the appellant's place of employment will be treated under two heads: (1) Evidence as to the general purpose of the subcommittee's investigation; and (2) Evidence pertaining to the appellant himself.

(1) Evidence as to the general purpose of the subcommittee's investigation.

In order to prove the purpose of the subcommittee's San Francisco hearings, the government called as its first witness one William Wheeler, who identified himself as an investigator for the Committee on un-American Activities.[1] Over objection based on his lack of qualifications to speak for the committee, Mr. Wheeler testified that the subject of the hearings was "the nature, the extent and the objects of the Communist Party in this (San Francisco Bay) area" (Trial Tr. p. 50). He also identified a statement of

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[1]The purpose of the hearings is a relevant matter of proof for the government in a prosecution under 2 U.S.C. 192 because of the provision in the statute that to render a refusal to answer culpable the question asked must be "pertinent to the question under inquiry" by the committee. See *Sinclair v. United States,* 279 U.S. 263 (1929); *Bowers v. United States,* 202 F. 2d 447 (D.C. Cir. 1953).

purposes made by Chairman Velde on the first day of the hearings (Govt. Exh. 7), pertinent extracts from which follow:[2]

"It has been fully established by testimony before this and other congressional committees, as well as the courts of our land, that the Communist Party of the United States is *part of an international conspiracy which is being used as a tool or weapon by a foreign power to promote its own foreign policy and which has for its object the overthrow of the governments of all non-Communist countries, resorting to the use of force and violence if necessary.*"

(Govt. Exh. 7, p. 3055.)

* * *

"It is the purpose of this investigation to ascertain the nature, extent, character and objects of *Communist infiltration in the Bay area where there is a great concentration of defense industry* and where the headquarters of District No. 13 of the Communist Party are maintained. This investigation, unlike those conducted in the Territory of Hawaii and southern California, is not concentrated upon a single industry or enterprise. For the time being the work of the committee will be of a more general character." (*Ibid.*, p. 3056.)

* * *

"The Committee * * * is concerned only with the facts showing the extent, character, and objects of the Communist Party activities * * * It has the single purpose of disclosing *subversive propa-*

[2]Italics are added throughout the quotations which follow, unless otherwise noted.

ganda activities and machinations of the conspiracy whenever and wherever there is reason to believe it exists." (*Ibid.*, p. 3056.)

Further light on the purposes of the San Francisco hearings is shed in the "Annual Report of the Committee on Un-American Activities For The Year 1953" (Def. Exh. N):

"In December 1953 a subcommittee of the Committee on Un-American Activities held hearings in San Francisco, Calif., *which hearings dealt in large part with the nature, scope and objectives of Communist infiltration in that vital defense-area and center of west coast communications.* The committee received valuable testimony from individuals who had been members of the Communist Party and from others who had served as undercover agents for the Federal Government, reporting on activities of the Communist Party in the Bay area. Of particular significance in the San Francisco hearings was the effort made by the International Longshoremen's and Warehousemen's Union to coerce the committee into calling off the hearings. This action by union officials of the ILWU in ordering mass protest demonstrations in front of the Federal building demonstrated clearly the element of control exercised by a few individuals, and clearly indicated the need for further investigations in the San Francisco area. *There is reason to believe that in the event of a national emergency, such unquestioned authority and control* vested in the hands of individuals who have been identified under oath as past or present members of the Communist Party *could be used to completely*

demoralize and hamper an American defense effort." (*Ibid.*, p. 4.)

The 1953 Annual Report also quoted a statement issued by the committee following the completion of the San Francisco hearings, from which the following is taken:

"The nature of the testimony adduced during the week of hearings can lead the committee to one inescapable conclusion, and that is the existence of *a widespread communist infiltration into almost every activity in the Bay area.* The actual extent of that infiltration cannot accurately be determined by the facts presently in the record of the proceedings, but on the basis of similar hearings previously conducted by the committee in other great cities of the Nation it can be stated on considerable authority that the total membership of the Communist Party in this area numbered several thousands of persons." (*Ibid.*, p. 6.)

* * *

"The myth that the Communist conspiracy constitutes nothing more than the activities of individuals gathered together for the pursuit of legal political activities has long been exploded. Those who meet in secret under assumed names for the purpose of fomenting disorder, turmoil and revolution deserve the name 'conspirators'." (*Ibid.*, p. 6.)

Thus, it is clear from the official statements of the committee itself, statements which could be multiplied from the record, that the committee regarded its San Francisco hearings as having the objective of uncov-

ering and exposing a criminal conspiracy which it considered to be "infiltrating" industry in the Bay Area.

The record does not permit any doubt as to the purposes for which, in the committee's view, the Communists seek to infiltrate industry. In its publication entitled *"The Shameful Years, Thirty Years of Soviet Espionage in the United States,"* published December 30, 1951 (Def. Exh. M, p. 3), the committee asserts:

> "During the entire period covered by this report, *Soviet espionage activity within the United States has been dependent upon the Communist Party, U.S.A., for assistance.* It has been found that, with the exception of high party officials, *Communists pressed into duty for espionage* have been instructed to withdraw from open activity in the Communist Party while so engaged."

In the booklet *"100 Things You Should Know About Communism"* (Def. Ex. G), the committee alleges that Communists in industry are instructed to seek to "capture" the post of shop steward, because it gives them "an opportunity to manufacture grievances, to incite strikes, distribute Communist literature, and collect funds for Communist purposes and *engage in spying.*" In the same booklet, the ILWU, the union at Owens-Illinois Glass Company, where Mr. Fagerhaugh was employed, is described as "Communist dominated," and is said to have the ability in wartime to *"wreck the whole U. S. fighting power."* (*Ibid.,* pp. 81, 82.)

Further light on the setting in which the San Francisco hearings took place is obtained from an examination of the deluge of newspaper stories which appeared shortly before the hearings commenced. Bay Area newspapers included the following among other statements attributed to committee spokesmen:

(1) A story in the *San Francisco Chronicle* for October 29, 1953 (Def. Exh. H, reported that "several dozen Bay area residents" had been served with subpoenas ordering them to appear at a House Un-American Activities Committee investigation "into Communist activities." It quoted Representative Velde as announcing that the purpose of the hearings was "to investigate reported Communist efforts *to infiltrate 'the various phases of vital defense* and other Communist activities in the Northern California area'."

(2) A story in the *San Francisco Examiner* for November 2, 1953 (Def. Exh. I) quoted a "source close to the committee's operations" as stating that the committee planned to expose the *"elite Top Hundred"* from among Communists in this area. The only specific industrial activity mentioned in the story as slated for committee inquiry is "current infiltration among waterfront unions."

(3) The *Chronicle* for December 1, 1953 (Def. Exh. K) quoted Mr. Velde as announcing that the committee hearings will "go into *all phases of the Communist threat"* and that "The Bay Area is *very important to national defense* and always has been * * * For that reason, *many of the witnesses will come*

from key defense areas, including the waterfront." Informed that the ILWU was contemplating a stop-work meeting in protest against the hearings, Mr. Velde is quoted as replying: "That won't stop us. *They could tie up the whole West Coast in case of war.*" The story added that a number of the persons who have been subpoenaed are *"members and officers of the International Longshoremen's and Warehousemen's Union, particularly Local 6 here."*

(4) The *San Francisco Call-Bulletin* for December 1, 1953 (Def. Exh. L), quoted Mr. Velde as stating that the hearings would be concerned with *"Red infiltration in bay area defense industries."* He indicated that the committee was concerned with possible Communist espionage in the Bay Area, stating: "* * * here in San Francisco the first inkling by the FBI that there was a *Soviet spy ring operating in this country* was brought out by a House Un-American Activities Committee report."

(5) The *Examiner* on December 1, 1953 (Def. Exh. J) in a story by Will Stevens, relates that "The House Un-American Activities Committee will open ten days of hearings here this morning into all phases of Communist activities in the Bay area, *with particular emphasis on defense industries along with heavy espionage overtones."* It quotes Mr. Velde as stating that a *"Soviet espionage ring" was discovered operating here in 1948.* Mr. Velde is also quoted as "pointing out that he considers 'the waterfront and the International Longshoremen's and Warehousemen's Union as part of the defense industry'," and that he

considered "the waterfront phase very important—*the ILWU could tie up the entire West Coast* as they did the Hawaiian Islands if the word goes out."

The same story quotes Representative Jackson, the member of the subcommittee who later presented the committee's position on the Fagerhaugh citation on the floor of Congress (Def. Exh. S), as declaring that the four most important fields which the committee proposed to investigate at the San Francisco hearings were *"atomic research, national defense, communications and labor."* He is also quoted in the story as saying:

> "San Francisco was and is a *natural target for the Communist conspiracy. Its vital defense activities and its position as a great center of world communications rendered it a very desirable location for the infiltration effort.*
>
> "To what extent these efforts were successful will be in a general way demonstrated during the forthcoming hearings.
>
> "It is generally acknowledged that *New York and California are the two focal points of the Communist attack.* It is our job to determine what element of success attended the Communist efforts to obtain a firm foothold in this area. The committee is particularly concerned with those aspects of infiltration which deal with *vital defense and research establishments.*
>
> "Recent disclosures have indicated that *no segment of our national life has escaped the attention of the Communist conspiracy and its agents.*
>
> *"It has been established in sworn testimony that agents of the conspiracy were active in the San*

Francisco Bay area in such fields as atomic research, national defense, communications, and labor."

Addressing himself to the reported intention of opponents of the committee to stage protest meetings, Representative Jackson branded such opponents as "The dissident two percent who appear willing to condone *espionage, subversion and anarchy* * * *"

To summarize, the openly proclaimed purpose of the investigation was to expose Communist infiltration in the San Francisco Bay Area, especially infiltration into industry. The aim and object of this infiltration, according to numerous statements of spokesmen for the committee, is the commission of a series of criminal acts against the security of the United States, the variety as well as gravity of which will be considered later. Such was the setting in which the appellant was summoned to testify before the subcommittee. We proceed to consider the evidence pertaining to the appellant.

(2) Evidence pertaining to the appellant.

On October 28, 1953, the appellant was served with a subpena calling on him to testify as a witness before the committee at San Francisco on December 1, 1953 (Def. Exh. A, Trial Tr. 10-11). The subpena gave the home address of the appellant and recited the fact that his business address was Illinois Glass Company, 601 36th Avenue, Oakland.[3] Mr. Fagerhaugh was

[3]The correct name of the Company is Owens-Illinois Glass Company (Trial Tr. 94).

served at the last mentioned address, his place of employment (Trial Tr. 95). Later he was notified by telegram that the date of his appearance had been continued to December 3, 1953 (Govt. Exh. 4, p. 2; Trial Tr. 11-12).

The record shows that shortly after the appellant received his subpena the newspapers of the Bay Area commenced to feature prominently the forthcoming probe. Some of the stories which appeared in the local press have previously been quoted. Among them is the Will Stevens story in the *Examiner* of November 2, 1953, in which a "source close to the committee's operations" is quoted as stating that the persons subpoenaed constituted an "elite Top Hundred" among the "active communists" in this area (Def. Exh. I). The same newspaper story declared that "The activities of the 'Top Hundred' have been checked only recently after their activities were first disclosed to the committee by special operatives, working under the direction of the Federal Bureau of Investigation, who joined the Communist Party in this area" (*ibid.*).

The subcommittee's first witness on the morning of December 3rd, the day on which the appellant had been ordered to appear, was one Charles David Blodgett. Mr. Blodgett, a socalled "friendly" witness, testified at great length. Among other things, he stated under oath that he had attended many meetings of a Communist Party group in Alameda County known as the "Political Affairs Committee"; that the committee was a key committee of the Communist Party "as far as all political activity in the county

is concerned"; that it was "charged with the responsibility of actually carrying out the line of the party in every phase of the party's work in Alameda County"; that it "brought together the key people as far as the functioning of the Communist Party is concerned"; that the committee took elaborate precautions to ensure the secrecy of its meetings; that the personnel of the committee included "trade union people, key people in trade unions in the East Bay" (Def. Exh. E, pp. 3296-3297).

Among the "key people in trade unions" identified by Blodgett as having membership in the Political Affairs Committee was the appellant, Ole Fagerhaugh (Def. Exh. E, p. 3297, last line). Mr. Fagerhaugh, who had been ordered to be present on the day of Mr. Blodgett's testimony, was himself summoned to the witness stand the following day.

The testimony given by appellant has already been mentioned briefly. As was pointed out, he declined to state where he was then employed, basing himself on the ground of "my rights under the fifth amendment."[4] Immediately thereafter, and without first directing the appellant to answer the place of employment question, the committee launched into a series of questions about the appellant's alleged membership and activities in the Communist Party

[4]In the *Quinn* case (75 S. Ct. 668, at 673) the Supreme Court declared that "the term 'Fifth Amendment' in the context of our time is commonly regarded as being synonymous with the privilege against self-incrimination." No contention is made, so far as we know, that the subcommittee was not adequately apprised that the privilege was being invoked.

(Govt. Exh. 8, pp. 3369-3371; Appendix hereto). To each question the appellant asserted the privilege against self-incrimination. These circumstances make relevant those decisions which hold that in determining whether a particular question presents a possibility of self-incrimination, all of the questions asked the witness must be considered as a whole. *Foot v. Buchanan,* 113 Fed. 156, 161 (1902); *Poretto v. United States,* 196 F. 2d 392, 396; *United States v. Raley,* 96 F. Supp. 495, 498 (1951). In view of the subject matter of the hearing, and the obvious interconnection of all of the questions asked the witness, there is no justification for the government's attempt to take the place of employment question out of its actual context, or for its argument that the question had no connection with the remainder of the interrogation, all of which related to Communist membership and activity.

C. THE SUBCOMMITTEE'S PURPOSE IN QUESTIONING PERSONS NAMED AS COMMUNISTS CONCERNING THEIR PLACES OF EMPLOYMENT.

The government contended below that the "Where are you employed" question merely served the purpose of identification of the witness. Wheeler, the investigator who was the government's major witness below, so testified (Trial Tr. 71-73). We have some difficulty in reconciling this contention with the facts that Mr. Fagerhaugh readily identified himself by name and address, and that the committee's own records showed, as their counsel admitted, that the subcommittee had directed the sub-

pena to be served at the appellant's place of employment.

If, however, it be true that mentioning his place of employment might have contributed in some slight degree to Mr. Fagerhaugh's identification, that is of no consequence if the answer would tend to incriminate him. To illustrate, it would undoubtedly have contributed to the identification of the witness if the committee had asked: "Aren't you the Ole Fagerhaugh who obtained employment at Owens-Illinois Glass Company for the purpose of furthering the Communist conspiracy?" Yet there could be no question of his right to refuse to answer such a question on constitutional grounds. The mere fact that the committee might choose to divide the question into two elements (e.g., "Are you the Ole Fagerhaugh who is employed at Owens-Illinois Glass Company?" and "Didn't you obtain employment there for the purpose of furthering the Communist conspiracy?") cannot defeat the right to assert the constitutional privilege. The privilege, as the Supreme Court held once again in the *Emspak* case, is not limited to admissions which "by themselves would support a conviction under a criminal statute" but embraces every "link in the chain of evidence needed to prosecute * * * for a federal crime" (75 S. Ct. at 692-693). The government, we submit, cannot blow hot and cold at the same time; cannot publicly accuse Communists of engaging in a a conspiracy to commit all manner of felonious acts in industry, and then deny that the naming by a person charged with being a member of the "Communist

conspiracy'' of the place where he is employed—the place where according to the committee he would engage in carrying out the objects of the alleged conspiracy—could possibly constitute an incriminating admission.

Fortunately, we are not required to leave to speculation the committee's real purpose in inquiring as to the witness' place of employment. The government's belated contention that the purpose is merely the ''routine'' one of identification is refuted by authorities weightier than Mr. Wheeler, namely Chairman Velde of the Un-American Activities Committee and Representative Jackson, one of its leading members. Chairman Velde himself disclosed the true reason for the employment question only a few minutes after Mr. Fagerhaugh had been excused from the witness stand. The transcript discloses that four consecutive witnesses who followed Mr. Fagerhaugh on the witness stand that morning, a Mrs. Williams and Messrs. Ward, Attarian and Black, likewise declined to name their places of employment (Govt. Exh. 8, pp. 3373, 3374, 3378, 3380).[5] During the testimony of Mr. Ward Chairman Velde volunteered the following explanation of the committee's interest in where the witnesses were employed:

> ''Mr. Velde. * * * I want the record to show at this point * * * that the committee has a duty

[5]The questioning of each of these witnesses, with the exception of Mrs. Williams, demonstrated that the committee already knew where each witness was employed, but nevertheless sought to spread the information on the public record. (Govt. Exh. 8, pp. 3375, 3378, 3381-3382).

imposed upon it to ascertain the extent of infiltration and subversion, particularly at the present time, of the Communist Party into various fields of employment. *The reason you are asked concerning your employment is to enable this committee to determine the extent of infiltration of subversive activities into the various industries, various fields of employment.*"

(Govt. Exh. 8, p. 3376.)

In other words, the committee, which accepts as axiomatic that Communists are bent on infiltrating all kinds of industry for subversive purposes, expects the witnesses before it (persons who have been named under oath as Communists) accommodatingly to describe the place where they are engaged in carrying on their nefarious activities!

Further, and conclusive, proof that the "Where are you employed" question is not mere matter of identification, but is aimed at the uncovering of alleged conspiratorial activities of Communists in industry, is found in the proceedings which occurred in the House of Representatives when the resolution to cite Mr. Fagerhaugh for contempt was voted on. The contempt resolution was presented on behalf of the Un-American Activities Committee by Representative Jackson, who had participated in the San Francisco investigation. Mr. Jackson explained that Mr. Fagerhaugh had invoked the Fifth Amendment with respect to the question "Where are you presently employed?", and added: "The committee felt that saying that he was employed at the Illinois Glass Co., Oakland,

Calif., could not possibly incriminate him * * *.'' Representative Keating of New York thereupon asked Mr. Jackson to state ''the reason why the committee felt that that question was pertinent to the subject matter under inquiry.'' To this Mr. Jackson replied as follows:

> ''Yes, there were two principal reasons why the committee felt that the matter of his place of employment was important. First of all, as a matter of proper identification. *Secondly, one of the principal goals of the Communist Party, as has been developed in testimony, has been to place Communist Party members in certain areas of employment.* We know, for instance, that during the war an effort was made in the Baltimore area to place white collar workers in heavy industry. *That has been developed throughout the country, and in order to develop that pattern, if it exists, the committee has made a very strong effort to determine the place of employment of one who has been identified under oath as a member of the Communist Party.''*
>
> (Cong. Rec. May 11, 1954, p. 6031, Def. Exh. S.)

Clearly, the subcommittee's interest in determining the place of employment of witnesses is not limited to identification, but derives its pertinence from the committee's view that such information is an essential part of its *raison d'être,* the exposure of Communist ''infiltration'' of industry.

D. THE DANGERS INVOLVED IN A RESPONSIVE ANSWER, IN THE SETTING OF THIS CASE, TO THE QUESTION "WHERE ARE YOU PRESENTLY EMPLOYED?"

As Mr. Chief Justice Warren pointed out in the *Emspak* case, *supra,* in justifying the right of a person charged with being a Communist to invoke the Fifth Amendment in response to innocent-seeming questions about his associations, such information

> "* * * could well have furnished a 'link in the chain' of evidence needed to prosecute petitioner for a federal crime, ranging from conspiracy to violate the Smith Act to the filing of a false non-Communist affidavit under the Taft Hartley Act."
>
> *Emspak v. United States,* 75 S. Ct. 687, at 694.

The same possible violations of federal law are directly involved in the instant case, too, since the appellant was identified under oath by the witness Blodgett not only as a leading Communist, but also as one of the "key people in trade unions" *supra,* p. 18.

Other federal crimes which would be committed in the carrying out of the activities which the committee attributes to Communists include:

Espionage: 62 Stat. 737 (20 years; in wartime death or 30 years).

Sabotage in peacetime: 62 Stat. 800 ($10,000 or 10 years or both).

Conspiracy to commit sabotage in wartime: 62 Stat. 799 ($10,000 or 30 years or both).

Theft of atomic secrets: Atomic Energy Act, 60 Stat. 755-775, as amended by 65 Stat. 692, ch. 633 (death or life imprisonment on jury recommendation, otherwise $20,000 or 20 years or both).

Treason: 62 Stat. 807 (death or $10,000 and 5 years, or both).

Failure to register as member of subversive organization: Subversive Activities Control Act of 1950, 50 U.S.C. 794(a) ($10,000 or 5 years or both for each day of failure to register).

Attempting to cause insubordination or disloyalty among military personnel: 62 Stat. 811 ($10,000 or 10 years or both).

Failure to register as propaganda agent of a foreign principal: Foreign Agents Registration Act, 22 U.S.C. Secs. 611-621 ($10,000 or 5 years or both).

There should also be mention of the Communist Control Act of 1954, 68 Stat. 775, concerning which a noted legal scholar has remarked:

> "The Communist Control Act of 1954 has enlarged even more the basis for claim of privilege, for it prescribes fourteen indicia of Communist membership. Some of them are entirely innocent in themselves, yet each is now declared by law to be evidence of membership, and in conjunction they seem to provide a virtually unlimited basis for invoking the Fifth Amendment."[6]

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[6]Telford Taylor, "Grand Inquest" (Simon and Schuster, 1955), p. 204.

Apart from punishment for specific crimes, "subversive activities" today may result in deportation (66 Stat. 205-208), revocation of citizenship (66 Stat. 260-262), exclusion from government housing (66 Stat. 403), denial of GI educational rights (66 Stat. 667), denial of the right to a passport (64 Stat. 993), indefinite detention in emergency without warrant or trial (Emergency Detention Act of 1950, 64 Stat. 1019-1030), denial of government employment (64 Stat. 991), denial of employment in defense industries (64 Stat. 992), compulsory registration with the Attorney-General (64 Stat. 995), and much more.[7]

With respect to most of the crimes listed above, the place of employment of the defendant would be highly material, indeed would be an essential element of the prosecution's case. It is common knowledge that in Smith Act cases, for example, the government has convicted more than one hundred Communist leaders by evidence believed by the juries, that the Communist Party seeks to persuade the workers of America of the necessity of using force to overthrow the government and abolish private ownership of industry. In prosecutions under the sabotage and espionage laws the place of employment would be equally

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[7]All of the penalties mentioned above are "legal" penalties, with which the privilege against self-incrimination is exclusively concerned. Accordingly, there will be no emphasis herein of the drastic "private" or "informal" penalties such as loss of jobs, social ostracism and exposure to public obloquy to which the committee refers when it proclaims its intention to "identify" Communists, "neutralize" their activities, "leave them high and dry on the beach", and "pull out Communism by the roots in this area" (*Examiner,* November 2, 1953, Def. Exh. I).

essential to the proof. In prosecution of a Communist under some of the other laws mentioned above it is clear that his place of employment could easily constitute "a link in the chain of evidence needed in a prosecution" (*Blau v. United States,* 340 U.S. 159, 161 (1950).) It should not be forgotten that according to the theory of the Un-American Activities Committee, as expressed in the extracts from its publications set out above, industry is the main target of the "Communist conspiracy," the *locus* where the alleged machinations of the Party are chiefly carried out. When one considers the wide range of territory covered in a typical prosecution for conspiracy to violate the Smith Act, to name but one example, it surely is a perversion of logic to argue that an admission from an alleged Communist as to his place of employment *"cannot possibly"* have a tendency to incriminate him. *Hoffman v. United States,* 341 U.S. 479, 488 (1950). Such is the test which the Supreme Court emphasized in the *Hoffman* case. It is the test which accords with the liberal construction which must be given to the privilege. It is the test which, applied to the instant case, requires a reversal of the judgment below.

E. THE CONTENTION THAT SELF-INCRIMINATION WAS AN IMAGINARY POSSIBILITY, NOT A REAL DANGER.

The government, while not denying that the witness' place of employment could be an essential element in prosecutions under various laws affecting Communists, argued below that the "danger" of such prosecution in this case was remote and insubstantial,

and also that its existence was shown not by evidence but merely by argument of counsel.

If the government means by this that there was no evidence introduced that a Grand Jury was planning the indictment of Mr. Fagerhaugh for conspiracy to violate the Smith Act, or that Attorney General Brownell was engaged in investigating the appellant's activities with a view to prosecuting him for espionage or sabotage, we must of course agree. However, the government does not cite any authority which requires a showing that prosecution is imminent, nor is there any such authority, to our knowledge.

If on the other hand the government means that the possibility of prosecution of persons who have been identified under oath as "active Communists" and "key people in trade unions" is remote and insubstantial, then it is guilty of a willful misreading of recent history. The Un-American Activities Committee actually boasts of the number of prosecutions of alleged subversives which have been prompted by its exposures (1950 Annual Report Def. Exh. Q, pp. 31-32). The contention that persons identified as prominent Communists are in no real danger of prosecution under federal law comes with ill grace from a Department of Justice which has convicted more than a hundred persons for conspiracy to violate the Smith Act, others under the non-Communist oath provision of the Taft-Hartley Act, the espionage act, etc., and which has repeatedly announced its purpose of destroying the Communist movement by every means available to it.

It is contended, however, that the transcript of Mr. Fagerhaugh's testimony before the Committee shows that he didn't really "fear" prosecution; that his true motive in refusing to answer was to save his employer from being dragged into a "smear campaign." The contention misses the point. The question is not whether Mr. Fagerhaugh wanted to protect his employer from unpleasant publicity, but whether he had valid grounds for invoking his privilege against self-incrimination. If he had such grounds, the fact that his invocation might serve a secondary purpose is of no consequence. The situation in *Rogers v. United States,* 340 U.S. 367 (1950) relied on below by the government, was entirely different. There the witness, by freely answering questions as to her own membership and activities in the Communist Party, was held to have waived the right to refuse to answer questions as to her associations, since such questions, in the Court's view, "would not *further incriminate her*" (*Id.,* at 372). There was no such waiver here, as we show in the next section. That a desire to shield others does not vitiate the right to invoke the Fifth Amendment where the witness has adequate grounds for invoking it in his own behalf is made perfectly clear in the *Emspak* case, where the Court upheld the witness' refusal to answer 58 questions concerning his associations. Even Justice Harlan, who dissented in the case, declared:

> "The inference most readily to be drawn from the record is that Emspak did not want to 'stool pigeon' against his associates. While *such a motive would not, in my opinion, vitiate an other-*

wise valid claim of the privilege, it certainly furnishes no legal excuse for refusing to answer non-incriminatory questions."

Inherent in the government's position, as expressed in briefs and argument below, is the notion that the test of "fear" or "danger" of prosecution is a subjective one, to be ascertained by probing the state of mind of the witness. Consequently, the government relies on the following colloquy between Mr. Fagerhaugh and the committee (Govt. Exh. 8, p. 3369; Appendix herein):

"Mr. Velde. * * * Where are you employed?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft [his attorney].)

Mr. Fagerhaugh. I am going to decline to answer that question on the grounds of my rights under the Fifth Amendment.

Mr. Kunzig. Let me put it this way, Mr. Fagerhaugh: Are you employed at the Illinois Glass Co., 601 36th Avenue, Oakland, so that the record will state correctly?

Mr. Fagerhaugh. Same answer.

Mr. Kunzig. You feel that to answer 'Yes' or 'No' to that question would incriminate you?

Mr. Fagerhaugh. I don't feel that that answer or any answer I might give here might incriminate me. I have committed no crime. I am guilty of no crime, and I have nothing to fear. Now, my rights under the Constitution state that I may decline to answer this question on the grounds that I am guaranteed the right not to act as a witness against myself, and for further reasons—".

It is submitted that the witness' statement "I have nothing to fear" does not detract from his assertion of the privilege. It is probable that the statement was merely an assertion of a refusal to be intimidated by the committee. But if it be regarded as an expression of the witness' personal opinion as to the probability of prosecution for a federal crime, it changes nothing. The opinion of Mr. Fagerhaugh, a layman, that he had "nothing to fear" was obviously not shared by his attorney, Mr. Treuhaft, on whose advice Mr. Fagerhaugh invoked the Fifth Amendment. Furthermore, to make a witness' quantum of intestinal fortitude the measure of the right to claim the privilege would lead to fantastic results. A timid or nervous witness could validly rely on the privilege under circumstances where it could not fairly be claimed that a responsive answer would endanger him in the slightest degree, whereas a bold and fearless witness might be prevented from relying on the privilege under conditions of the utmost danger of prosecution. The exercise of important constitutional rights cannot be made to depend on such a frivolous distinction. See *United States v. St. Pierre,* 128 F. 2d 979, 980 (2d Cir. 1942).

F. THE CONTENTION THAT THE APPELLANT WAIVED THE PRIVILEGE.

The colloquy which was quoted in the preceding section raises another of the government's arguments, that of an alleged waiver of the privilege. Apparently it is the position of the government that Mr. Fagerhaugh lost the right to invoke the privilege when he

said that he did not feel that any of his answers would incriminate him, and added that he was guilty of no crime. In this the government is mistaken.

Preliminarily it should be noted that the Courts look with disfavor upon the contention that the privilege against self-incrimination has been waived. As the Supreme Court declared in *Emspak,* 75 S. Ct. 687, at 691, quoting from its decision in *Smith v. United States,* 337 U. S. 137, 150:

> "Although the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution * * * Waiver of constitutional rights * * * is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege * * * upon vague and uncertain evidence."

With this principle in mind we turn to consider whether the colloquy quoted above amounted to a waiver by Mr. Fagerhaugh of the privilege against self-incrimination.

First of all, it is clear from the context that when Mr. Fagerhaugh denied that his answer would "incriminate" him he used the word in the sense of "establish guilt," as proven by the fact that in the very next sentence he said that he was guilty of no crime. The privilege, however, "is not limited to admissions that 'would subject [a witness] to criminal prosecution'," but "also extends to admissions that may only *tend* to incriminate" (*Emspak v. United States,* 75 S. Ct. 687, at 692 (Italics added). It is therefore wrong to contend that the aforementioned

answer constituted an abandonment of the privilege, especially in view of the fact that in practically the same breath the witness reasserted his constitutional right "not to be a witness against myself."

Second, it may be contended that Mr. Fagerhaugh's assertion that he had "committed no crime," was "guilty of no crime," is tantamount to a waiver of the privilege. What was said in the preceding paragraph is likewise applicable here. In addition, it is pertinent to note the Supreme Court's recent reiteration of the famous dictum of *Twining v. New Jersey,* 211 U.S. 78, 91 (1908), that the privilege against self-incrimination is "a protection for the innocent" as well as for the guilty. *Quinn v. United States,* 75 S. Ct. 668, at 673. In the *Emspak* case the following colloquy took place at the committee hearing (*supra,* at 691):

> "Mr. Moulder. Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?
>
> Mr. Emspak. No. I don't think this committee has a right to pry into my associations. That is my own position."

The Court held that this did not constitute a waiver, citing its similar holding in *Smith v. United States, supra.* The applicability of these decisions to the instant case is clear and requires no elaboration.[8]

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[8]The Supreme Court also quotes approvingly from *United States v. St. Pierre,* 138 F. 2d 979, 980 (C.A. 2d 1942), as follows:

> "Nor is it material that appellant stated at several points that he had committed no federal crime; such a contradiction,

The government also contends that the appellant waived his right to invoke the privilege as to his place of employment when he answered preliminary questions as to name, address, birthplace, citizenship and occupation. The last item is particularly stressed. It is argued that when Mr. Fagerhaugh testified that he is a warehouseman by occupation he "waived the privilege by giving testimony on the subject under inquiry." (The quotation is from the government's "Memorandum in Opposition to Motion to Dismiss and Motion to Acquit," page 8). *Rogers v. United States,* 340 U.S. 367 (1950) is relied on as authority for this proposition. We cannot agree.

It would require considerable brashness to assert that all is crystal clear with respect to the law regarding waiver of the privilege against self-incrimination. Compare *Arndstein v. McCarthy,* 254 U.S. 379 (1920) and its companion decision, *McCarthy v. Arndstein,* 262 U.S. 355 (1923), with *Rogers v. United States, supra.* The effect of the *Rogers* decision, as the dissenting justices point out, is to burden the harried witness with questions of timing complex enough to baffle a stable of Philadelphia lawyers. In the retrospective light cast on the problem of waiver by the extremely liberal decisions in *Quinn* and *Emspak, supra,* especially the latter, the *Rogers* case appears to represent an illiberal trend which has now been decisively repudiated by the Supreme Court. In any

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especially by a nervous or excitable witness would not overcome a clear claim of privilege if he was otherwise entitled to the privilege."

event, the situation here is in no way comparable to *Rogers*. In the latter case the witness had, in the words of the Court "freely described her membership, activities and office in the Party" (340 U.S. at 372). She was then asked a question as to her successor in office as Treasurer of the Communist Party in Denver, and refused to answer on grounds of self-incrimination. Because she had already answered the "$64 question," the Court was of the opinion that "response to the specific question in issue here would not *further incriminate* her" (Italics added).

Fagerhaugh's case is quite different. He answered routine questions as to identification, and stated that he was a warehouseman. But the transcript shows that when he was asked to state where he was employed *he consulted with his attorney* and then declined to answer the question. True, he at first placed his declination on the ground that the committee already knew his place of employment, the plain implication being that the question was "unrelated to a valid legislative purpose." (*Quinn, supra,* at 672) and was being asked in furtherance of the committee's avowed but illegal objective of "exposing subversives" and thereby causing them to lose their jobs.[9] It is in-

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[9]The committee boasts that its hearings on Louis Dolivet resulted in his loss of United Nations employment and removal as editor of United World. *Annual Report,* 1950, pp. 4-5.

The committee was responsible for the legislation depriving three government employees of their positions, later declared unconstitutional as a bill of attainder. *United States v. Lovett,* 328 U.S. 303, 308, 309, 315 (1946).

The transcript of the San Francisco hearings shows that two witnesses complained to the committee that being subpoenaed to testify before the committee cost them their jobs, even before they

ferable that here, as in the *Emspak* case, the witness' initial reluctance to use the Fifth Amendment was based on a desire to avoid "the unpopular opprobrium which often attaches to its exercise" (*Emspak v. United States, supra,* at 690), a fact which, as the Court there held, should make the committee "all the more ready to recognize" a claim of the privilege, even in veiled form.

The government must indeed be hard pressed for arguments if it finds it necessary to seek to analogize the answer "I am Treasurer of the Communist Party of Colorado" (*Rogers*) to the answer "I am a warehouseman" (Fagerhaugh), with the necessary implication that the latter response constituted such an "admission of guilt or incriminating facts" as would compel him to go on because his testimony could not "further incriminate him" (*Rogers v. United States,* 340 U.S. 367, 373). It is true, as the government was at pains to point out below, that membership in the Communist Party is not *per se* criminal, although the sweeping provisions of the Communist Control Act of 1954, 68 Stat. 775, the socalled "outlawry" statute, now make this proposition anything but obvious. But

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testified. George Van Frederick (Def. Exh. D, pp. 3240, 3241) and James Fenton Wood (*ibid.,* p. 3243). The committee even goes to the length of implying that it will trade its assistance in getting the witness' job back for the witness' cooperation in waiving his right to refuse to testify on Fifth Amendment grounds, viz.:

> "Mr. Wood. Will the committee take action to get my job back?
>
> Mr. Jackson. Will you take action to cooperate with the committee in telling us what you know about the Communist conspiracy?"
>
> (Def. Exh. D, p. 3245.)

it smacks of hypocrisy for a representative of the Department of Justice, which has recently been initiating prosecutions under the membership provisions of the Smith Act, to suggest that an admission of membership in the Communist Party is not, in these perilous times, in the highest degree incriminating within the contemplation of the Fifth Amendment, or that a general statement that one is a warehouseman, one of the many thousands of persons who follow that vocation, is in the same category. Justice is not promoted by such casuistry.

With respect to the matter of waiver, the facts of the instant case are far closer to *Hoffman v. United States,* 341 U.S. 479 (1950) than to the *Rogers* case. In *Hoffman,* the Supreme Court upheld the refusal of a witness, upon the ground of possible self-incrimination, to answer a question as to his occupation. In addition, the witness was asked seven questions regarding a certain William Weisberg, three of which he answered and four of which he refused to answer on claim of the privilege against self-incrimination. A careful reading of the opinion (which, incidentally, was subsequent to *Rogers v. United States*), indicates that while the question of waiver was not as such discussed, the Court was aware that answers had been given to some of the questions. Notwithstanding this the claim of privilege was held valid. The language of the Court in this connection is illuminating:

> "But of the seven questions relating to Weisberg (of which three were answered), three were designed to draw information as to petitioner's

> contacts and connection with the fugitive witness; and the final question, perhaps an afterthought of the prosecutor, inquired of Weisberg's whereabouts at the time. All of them could easily have required answers that would forge links in a chain of facts imperiling petitioner with conviction of a federal crime. The three questions, if answered affirmatively, would establish contacts between petitioner and Weisberg during the crucial period when the latter was eluding the grand jury; and in the context of these inquiries the last question might well have called for disclosure that Weisberg was hiding away on petitioner's premises or with his assistance. Petitioner could reasonably have sensed the peril of prosecution for federal offenses ranging from obstruction to conspiracy.
>
> "In this setting it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer cannot possibly have such tendency' to incriminate."
>
> (*Hoffman v. United States, supra,* at 488-489.)

The government in a memorandum filed below admitted that *Hoffman* "does have similarities to the present case" but attempted to distinguish it on the ground that in *Hoffman* a grand jury had been invoked to investigate "the whole gamut of federal crimes," and the defendant was a "notorious gangster" with a criminal record. The argument overlooks the fact that Communists today are threatened with prosecution under a veritable arsenal of repressive laws, as was pointed out in detail above, and that

a person named under oath as a leading Communist faces as great if not a greater peril of prosecution than a gangster. To refuse to see this could only be the result of that wilful blindness to realities which Mr. Justice Frankfurter, quoting the late Chief Justice Taft, castigated in *United States v. Rumely,* 345 U.S. 41, 44 (1953).

In sum, there was no "intelligent and unequivocal" waiver of the privilege against self-incrimination. There was in fact no waiver at all, express or implied. On the contrary, there was an explicit invocation of the privilege, on the advice of counsel, which was never abandoned. As the Supreme Court declared regarding the government's similar contention in *Emspak:*

> "To conclude otherwise would be to violate this Court's own oft-repeated admonition that the Courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' "[10]

G. THE SUBCOMMITTEE'S FAILURE TO RULE UPON THE APPELLANT'S ASSERTION OF THE PRIVILEGE OR TO DIRECT HIM TO ANSWER.

Apart from the appellant's valid reliance upon the privilege against self-incrimination, there is a second, independent reason why the decision below constitutes error and must be reversed. We refer to the subcommittee's failure to rule upon the appellant's assertion

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[10] *Emspak v. United States,* 75 S. Ct. 687, at 692, citing *Johnson v. Zerbst,* 304 U.S. 458, 464 (1937); *Glasser v. United States,* 315 U.S. 60, 70 (1941), and *Smith v. United States,* 337 U.S. 137, 150 (1948).

of the privilege or to direct the appellant to answer the question after the privilege was invoked.

As has been noted, the appellant at first demurred at answering the place of employment question on the ground that the committee already knew the answer, the implication being that the question was not asked in furtherance of a legitimate legislative objective but for the purpose of imposing extralegal punishment. This objection the committee specifically overruled by directing the witness to answer (Govt. Exh. 8, 3368, last line; Appendix hereto). At that point Mr. Fagerhaugh, after consulting with his attorney, stated that he declined to answer the question "on the grounds of my rights under Fifth Amendment." *The committee did not rule upon the validity of the objection or again direct the witness to answer.* The witness was therefore not "clearly apprised that the committee demand[ed] his answer notwithstanding his objections," and hence there was no establishment of the criminal intent requisite to a conviction under Section 192. *Quinn v. United States, supra,* at 674-677; *Emspak v. United States, supra,* at 694; *Bart v. United States, supra,* at 714-715.

The seriousness of the committee's failure to direct Mr. Fagerhaugh to answer is compounded by the fact that the transcript gives excellent reason for believing the committee acquiesced in the assertion of privilege and abandoned the question. Following the invocation of the privilege a colloquy took place between Mr. Fagerhaugh and Chairman Velde in which the latter asked the witness to state why he felt he was entitled

to rely on the Fifth Amendment when he had "committed no crime." Mr. Fagerhaugh thereupon consulted his attorney and then endeavored to explain his position in response to the chairman's request, as follows:

> "Mr. Fagerhaugh. I want to make very clear my position on this because what is said here today may some day be used in a court of law, and so I want it clearly understood the reason—my reasons for claiming the right not to answer this question under the Fifth Amendment, and I would like to—
>
> Mr. Velde. Proceed, Mr. Counsel.
>
> Mr. Kunzig. Mr. Chairman, the witness has refused to answer on the grounds of the Fifth Amendment, and has said under oath he has not committed any crime. I should like therefore to ask him this question, whether you have ever been a—
>
> Mr. Treuhaft. Just a moment, counsel. The answer has not been finished, and you have interfered and interrupted."

There was then further consultation between the witness and his attorney, after which the following took place:

> "Mr. Fagerhaugh. I would like to continue—
>
> Mr. Kunzig. *There is no question before the witness.*
>
> Mr. Velde. *There is no question before the witness.*
>
> Mr. Fagerhaugh. I have not finished answering my reasons.
>
> Mr. Velde. You have been given permission and opportunity to confer with your counsel. *No question is pending.*"

The subcommittee then dropped the matter of the witness' place of employment and proceeded to question him about his membership in the Communist Party (Govt. Exh. 8, p. 3369; Appendix hereto).

The sentences italicized above are without plausible meaning except as an abandonment by the committee, following the assertion of the privilege, of its question concerning the witness' place of employment. In any event, in view of the foregoing exchange, it cannot tenably be argued that the witness had been "clearly apprised that the committee demand[ed] his answer notwithstanding his objections" or that he had been "confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt" (*Quinn v. United States, supra,* at 675). As in the *Quinn* case, "at best he was left to guess whether or not the committee had accepted his objection" (*ibid.*). Such a situation is incompatible with the requirement that a "deliberate, intentional refusal to answer" be established beyond a reasonable doubt (*ibid.,* at 674-675).

CONCLUSION.

During the trial below, as well as in the "Statement of Points on Which Appellant Relies", other grounds of error were advanced in addition to those arising out of the appellant's invocation of the Fifth Amendment, including lack of pertinency of the question, abridgement of the right of free speech, invasion of

the appellant's right to privacy, purgation of the alleged contempt, and incompleteness of the transcript of the committee hearing. These grounds were advanced in good faith and are not abandoned. However, it is the belief of counsel that the *Emspak, Quinn* and *Bart* cases are so directly in point and so completely dispositive of this appeal, that it would be a work of supererogation to burden the Court at this time with argument on the other issues. Accordingly, this brief has been limited to the issue of the privilege against self-incrimination. Should the Court indicate a desire for discussion of any of the other points, either in a supplemental brief or at the oral argument, counsel will be happy to comply.

It is respectfully requested that the judgment below should be reversed and the appellant acquitted.

Dated, Oakland, California,
July 8, 1955.

Respectfully submitted,
EDISES, TREUHAFT, GROSSMAN & GROGAN,
By BERTRAM EDISES,
EDWARD R. GROGAN,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

TESTIMONY OF OLE FAGERHAUGH, ACCOMPANIED BY HIS COUNSEL, ROBERT E. TREUHAFT.

Mr. Kunzig. Would you state your full name, please, for the record?

Mr. Fagerhaugh. My name is Ole Fagerhaugh.

Mr. Kunzig. How do you spell that, sir?

Mr. Fagerhaugh. First name, O-l-e; last name, F-a-g-e-r-h-a-u-g-h.

Mr. Kunzig. Mr. Fagerhaugh, I see you are accompanied by counsel. Would he please state his name and address for the record?

Mr. Treuhaft. My name is Robert E. Treuhaft, attorney at law, 1440 Broadway, Oakland. I would like to——

Mr. Kunzig. Mr. Fagerhaugh——

Mr. Treuhaft. Mr. Kunzig, I would like to say one word. I understand that at the close of my testimony yesterday a ruling was made that my subpoena was continued. Since I consider a subpena by this committee a form of intimidation——

Mr. Jackson. No, yours was not extended, Mr. Treuhaft. The action pertained to the witness who preceded you.

Mr. Treuhaft. Is it understood then that I am no longer under subpena before this committee?

Mr. Jackson. Yes; when you were dismissed from the committee, you were dismissed from any further obligation of the subpena.

Mr. Kunzig. Mr. Fagerhaugh, would you state your address, please?

Mr. Fagerhaugh. I live at 2285 East 19th Street, Oakland.

Mr. Kunzig. When and where were you born, sir?

Mr. Fagerhaugh. Well, I was born in May in the year of the San Francisco earthquake, but I assure you I was born in Norway, so I couldn't have had anything to do with that. I was born in Tromso, Norway, T-r-o-m-s-o.

Mr. Kunzig. Are you now a citizen of the United States?

Mr. Fagerhaugh. I am.

Mr. Kunzig. When did you become a citizen?

Mr. Fagerhaugh. I became a citizen by virtue of my father's becoming a citizen while I was still a minor.

Mr. Kunzig. When did he become a citizen?

Mr. Fagerhaugh. I think it was in 1912, if I am not mistaken.

Mr. Kunzig. What is your present employment, sir?

Mr. Fagerhaugh. I am a warehouseman.

Mr. Kunzig. Where are you employed?

(Upon order of the Chairman, certain remarks of the witness were ordered stricken at this point.)

Mr. Velde. Will you answer the question, please? What is your employment?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

(Upon order of the chairman, certain remarks of the witness were ordered stricken at this point.)

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Velde. Now will you answer the question, Mr. Witness, or give your legal basis for refusing to answer the question?

Mr. Fagerhaugh. Well, I am trying to give my reasons, including my legal reasons for refusing to answer this question, and I would like to proceed to do that if the committee will permit.

Mr. Jackson. Your opinion of the committee is not a legal reason for refusing to answer the questions. As a matter of fact, the committee is not at all concerned with your opinion of it.

Mr. Scherer. I am going to object to counsel in this case again telling the witness what to say.

Mr. Treuhaft. I am going to object to the committee making inferences that are unjustified.

Mr. Velde. The counsel should know his rights to confer with his witness. This is not a court of law as counsel well knows.

Mr. Treuhaft. I am aware of that.

Mr. Velde. This is a committee of Congress trying to ascertain the true facts about subversion in this country, and I ask that the counsel for the witness please remember that fact and act in accordance with the rules of the committee.

Will the witness answer the question?

Mr. Fagerhaugh. Will you repeat the question, please?

Mr. Kunzig. I believe if I recall correctly that the question was, Where are you presently employed?

Mr. Fagerhaugh. I am going to continue to stand on my right not to answer that question because, as

I say, the committee is already fully aware of where I am employed, and I don't see any purpose——

Mr. Scherer. Frankly I don't know where you are employed, I have no idea where you are employed, and the record should show where you are employed. It is not on the record, Mr. Chairman.

Mr. Velde. Frankly, I don't know, either, and I don't know whether any member of the committee knows.

Mr. Fagerhaugh. I would rather the committee enter that fact into the record from their own records. I am not going to be a party to dragging my employer into this smear campaign.

Mr. Jackson. Does the committee know where the witness is employed?

Mr. Kunzig. Yes, sir. May I answer that in 1 minute? I should like first to request that the witness be directed to answer that question, and then I will ask another one about the address.

Mr. Velde. Certainly, the witness is directed to answer the question. Where are you employed?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Fagerhaugh. I am going to decline to answer that question on the grounds of my rights under the fifth amendment.

Mr. Kunzig. Let me put it this way, Mr. Fagerhaugh: Are you employed at the Illinois Glass Co., 601 36th Avenue, Oakland, so that the record will state correctly?

Mr. Fagerhaugh. Same answer.

Mr. Kunzig. You feel that to answer "Yes" or "No" to that question would incriminate you?

Mr. Fagerhaugh. I don't feel that that answer or any answer I might give here might incriminate me. I have committed no crime. I am guilty of no crime, and I have nothing to fear. Now, my rights under the Constitution state that I may decline to answer this question on the grounds that I am guaranteed the right not to act as a witness against myself, and for further reasons——

Mr. Velde. In a criminal proceeding; is that not true? And you say you have committed no crime whatsoever. Then do you still feel that you are entitled to the protection of the fifth amendment, when you have committed no crime?

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Fagerhaugh. I want to make very clear my position on this because what is said here today may some day be used in a court of law, and so I want it clearly understood the reason—my reasons for claiming the right not to answer this question under the fifth amendment, and I would like to——

Mr. Velde. Proceed, Mr. Counsel.

Mr. Kunzig. Mr. Chairman, the witness has refused to answer on the grounds of the fifth amendment and has said under oath he has not committed any crime. I should like therefore to ask him this question, whether you have ever been a——

Mr. Treuhaft. Just a moment, counsel. The answer has not been finished, and you have interfered and interrupted.

Mr. Velde. Counsel knows his right to advise with his client; it is limited to that.

Mr. Treuhaft. I want to consult with my client.

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Velde. Give the counsel an opportunity to talk with the witness.

Mr. Kunzig. Mr. Chairman, may I continue with the questioning?

Mr. Fagerhaugh. I would like to continue——

Mr. Kunzig. There is no question before the witness.

Mr. Velde. There is no question before the witness.

Mr. Fagerhaugh. I have not finished answering my reasons.

Mr. Velde. You have been given permission and opportunity to confer with your counsel. No question is pending.

Mr. Fagerhaugh. I still didn't finish the question that was asked.

Mr. Kunzig. For the record, to make it clear, the previous question the witness declined to answer on the grounds of the fifth amendment. Now I ask this question, Mr. Fagerhaugh: Have you ever been a member of the Communist Party——

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Kunzig (continuing). Political Affairs Committee of Alameda County?

Mr. Fagerhaugh. I am not going to answer any further questions until I have been given an oppor-

tunity for the record to give a complete answer to the last question that was asked of me.

Mr. Velde. Well, will you give a complete answer, or will you refuse to answer, as you have done before?

Mr. Fagerhaugh. I want to give my reasons for declining to answer.

Mr. Velde. You may give your reasons, your explanation, if you will answer the question, but certainly not if you refuse to answer the question.

Mr. Fagerhaugh. I think it should be made very clear my reasons for refusing to answer this question because the committee seems to raise the question, well, what have I to fear to answer a question like where do I work. Well, for the sake of the record, I want my reasons, I want to give my reasons for declining to answer under the fifth amendment because this case may come into a court of law, and I want it clearly understood what my reasons are. Now, I would like——

Mr. Velde. You say you have committed no crime. Then how can you sit there and claim the privileges against self-incrimination?

Mr. Fagerhaugh. Because the fifth amendment was drawn up to protect the innocent as well as the guilty, as you well know, and Chief Justice Rutledge has said, and if I may quote him——

Mr. Velde. The committee is well aware of the——

Mr. Fagerhaugh. I am not so certain the committee is well aware, and for the record I would like to give a brief quote.

Mr. Jackson. In regular order, Mr. Chairman, let us have the questions and get the declinations or the answers.

Mr. Velde. If the witness continues to make voluntary statements not in answer to the question that counsel asks and the members of this committee ask, I assure you that you will be removed from the hearing room.

Proceed, Mr. Counsel.

Mr. Kunzig. The question now before the witness which he has been evading, Mr. Chairman, is: Have you ever been a member of the Political Affairs Committee of the Communist Party of Alameda County, a very simple question to answer.

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Fagerhaugh. Pardon me, what was the question?

(Representative Donald L. Jackson left the hearing room at this point.)

Mr. Kunzig. Well, I just wonder how you can confer all that time without knowing the question, but I will repeat it for about the fourth time, Mr. Witness. Have you ever been a member of the Political Affairs Committee of the Communist Party of Alameda County, as was testified here yesterday by Mr. Blodgett?

Mr. Fagerhaugh. I decline to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. Have you ever been a member of the Communist Party at any time whatsoever?

Mr. Fagerhaugh. I likewise decline to answer that question on the grounds of my rights under the fifth amendment.

Mr. Kunzig. Are you now a member of the Communist Party?

Mr. Fagerhaugh. I further decline to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. No further questions, Mr. Chairman.

Mr. Velde. Mr. Scherer.

Mr. Scherer. No questions.

Mr. Velde. Mr. Doyle.

Mr. Doyle. No questions.

Mr. Velde. I have no further questions——

(At this point Mr. Fagerhaugh conferred with Mr. Treuhaft.)

Mr. Velde. Except I would like to make this observation as I did with the previous witness: Your refusal to give this committee information concerning subversive activities in which you might have been engaged or that you might have been engaged in in this area can only lead us to believe that you must presently be engaged in subversive activities.

Is there any reason why this witness should be further retained under subpena?

Mr. Kunzig. No, sir.

Mr. Velde. The witness is dismissed, and the committee will be in recess for 10 minutes.